*Co.*, 237 F.3d 701, 706 (6th Cir. 2001). There, the Sixth Circuit stated that when a plaintiff seeks to proceed under a "regarded as" theory, the Court must look to the state of mind of the employer against whom plaintiff makes a claim. *Id.* Under the "regarded as" prong of the ADA, membership in the protected class becomes a question of intent and, "that question—*i.e.*, the employer's motive—is one rarely susceptible to resolution at the summary judgment stage." *Id.* (Emphasis added).

The *Ross* Court examined whether a former employer's proffered reasons for terminating an employee, (employee was not meeting performance expectations), was pretext for disability discrimination. *Id.* at 708-709. In analyzing this issue in the context of whether the former employer "regarded" the plaintiff as disabled, the Court stressed that the likelihood that the company regarded plaintiff as disabled and acted with discriminatory intent in terminating his employment is heightened by the evidence presented that plaintiff was otherwise qualified to perform his job at Campbell Soup Co. and that the justifications presented for firing plaintiff were pretextual. *Id.* at 708.

The *Ross* Court noted that the fact that evidence that the former employer's proffered reasons for termination were pretextual is material to this point is a peculiar function of the "regarded as" prong of the ADA. *Id.* That "as the regulations interpreting the ADA explain, the purpose of the regarded as prong is to provide a cause of action to individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities." *See Sutton*, 527 U.S. at 489; (quoting 29 CFR pt. 1630, App. § 1630.2(l). Those regulations continue,

> "Therefore, if an individual can show that an employer . . . made an employment decision because of a perception of disability based on "myth, fear, or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a nondiscriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear, or stereotype" can be drawn." *Id.* (Emphasis added)

The *Ross* Court went on to note that because, under the "regarded as" prong, plaintiff's prima facie showing that he is disabled turns upon the employer's state of mind and how it thought plaintiff's back condition affected his performance as an employee, evidence of the employer's state of mind that would ordinarily be used to prove motive or discriminatory intent may also be probative of plaintiff's status as a person with a disability as defined by the ADA. *Id.* Thus, evidence that the company created a pretextual reason for plaintiff's firing may tend to prove that it regarded plaintiff as a disabled employee. *Id.*

While the facts in the instant case are directly on point with *Ross*, the Seventh Circuit refused to adopt the principles expressed by the Sixth Circuit. Like Ross, Nese's medical status played a key role in Nordic and Administaff's decision to concoct a pretextual basis for termination. Despite the fact that evidence of this conspiracy was established through doctored records, copies of memos and deposition testimony, Nese's case was dismissed.

Had the holding in *Ross* applied to the instant matter, the need for more extensive factual inquiry into whether

Nordic engaged in unlawful discrimination would have been especially acute.

Many reviewing courts, since *Ross*, have examined the breadth of the *Ross* and have articulated concerns over plaintiff's attempts to equate pretext to evidence of substantially limited in working. In this regard, the Seventh Circuit cited to *Rakity v. Dillon Co.*, 302 F.3d 1152 (10th Cir. 2002), wherein the 10th Circuit stated that "some interpret *Ross* to mean the issue of pretextually concealed discrimination and the issue of "regarded as" disabled should be treated as one and the same. *Id.* at 1065. That "this proposed modification of the *McDonnell Douglas* framework would open the protected class to individuals who neither have an actual disability nor can even present triable evidence their employer believed they have a disability." *Id.*

Here, Nese did not contend that the issue of pretextually concealed discrimination and "regarded as" are on and the same. Rather, the holding in *Ross* is applicable to those cases in which the plaintiff has presented enough evidence to create a genuine factual dispute as to whether the employer regarded its employee as unable to work. *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593, 599-601 (6th Cir. 2002).

Nese was not fired due to work restriction placed upon him following a work physical (*Rakity*) or due to the fact that work restrictions limited him from working in wet or damp conditions (*Moore*). Unlike these two cases, the evidence here established that as the result of Nordic and Administaff's concerns regarding Nese's medical status, these defendants invented a legitimate basis to terminate his employment.

As referenced earlier, on two occasions during Nese's employment with Nordic, Nordic's President Tom Julian asked Nese whether his epilepsy affected his ability to perform his job. In terms of Nordic's state of mind and how it thought Nese's seizure disorder affected his performance as an employee, evidence that Defendants created a pretextual reason for firing Nese is relevant to whether Defendants regarded him as a disabled employee. Given that Nese was an at-will employee, what reason would the Defendants have to alter his employment records? If they truly felt his work performance was so deficient that it merited termination, why not simply fire him?

The answer to these questions is that the evidence leads a reasonable mind to conclude that Defendants made an employment decision because of a perception of disability based on fear. Hence, Nese's seizure disorder played a significant role in his termination. Here, there is sufficient evidence that Defendants concocted a pretextual justification for terminating Plaintiff's employment. This fact alone, when examined in a light most favorable to Plaintiff and resolving all inferences in his favor, compels one to conclude that Nese's epilepsy was significant in the Defendants decision to terminate him.

Rather than engage in the type of analysis articulated in *Ross*, the Seventh Circuit adopted the reasoning expressed in *Moore* and *Rakity*:

> "For example, perhaps the employer terminates an employee simply because her supervisor does not get along with her. That might no be a reason the employer wants to admit openly, so, instead, work deficiencies—real or imagined—are cited as the basis for the action." (*See* Appendix A at 7a)

Such an approach serves as an excuse to ignore the clear inferences that should be drawn from the evidence presented in this case. As opposed to drawing the conclusion that Nordic was simply less than forthcoming in identifying its reasons for terminating Nese, a reasonable mind could conclude that Defendants made an employment decision because of a perception of disability based on fear.

Hence, Nese's seizure disorder played a significant role in his termination. Here, there is sufficient evidence that Defendants concocted a pretextual justification for terminating Plaintiff's employment. This fact alone, when examined in a light most favorable to Plaintiff and resolving all inferences in his favor, compels one to conclude that Nese's epilepsy was significant in the Defendants decision to terminate him.

Clearly, the alteration of these documents impacts heavily upon the credibility of the Defendants and the reliability of their explanation that they fired Nese because his work performance was deficient.

Thus, certiorari is warranted to resolve the split between the Sixth Circuit and the other circuits as to whether substantial evidence .hat an individual's medical status played a significant role in an employer's decision to fire that individual, combined with evidence that the employer concocted a pretextual justification for that firing, the need for more extensive factual inquiry into whether the employer engaged in unlawful discrimination should be is especially acute for purposes of summary judgment.

## CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

ROBERT SHULMAN
*Counsel of Record*
ELLIOT S. WICZER
BERNARD WICZER
WICZER & ZELMAR, LLC
500 Skokie Boulevard, Suite 350
Northbrook, Illinois 60062
(847) 849-4800

*Attorneys for Petitioner*

# APPENDIX

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED APRIL 27, 2005

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

No. 04-2576

LOUIS V. NESE,

*Plaintiff-Appellant,*

*v.*

JULIAN NORDIC CONSTRUCTION COMPANY and ADMINISTAFF,

*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 02 C 5839—**John W. Darrah**, *Judge*

ARGUED FEBRUARY 8, 2005—DECIDED APRIL 27, 2005.

Before RIPPLE, EVANS, and WILLIAMS, *Circuit Judges.*

EVANS, *Circuit Judge.* Louis Nese claims that his employer violated the Americans with Disabilities Act, 42 U.S.C. § 12101(ADA), by reducing his wages and then terminating him because of its incorrect perception that he had a disability. The district court granted summary judgment for the employer and Nese appeals.

## *Appendix A*

Nese, who is now in his forties, began having epileptic seizures when he was 15 years old. He has taken prescription medication to control his seizures for about 27 years. He experiences no side effects from the medication and has regularly worked as a carpenter for various employers, including Handy Andy and Builders Square. He has also run a company of his own, though it apparently was not profitable. The defendant, Julian and Nordic Industries, Inc. (that's the name we find in one brief—the other says Nordic Construction Services, Inc.), which we will refer to as Nordic, is a general contractor providing commercial and residential services and fire and water damage restoration. Administaff is a professional personnel management company, providing services to Nordic.

Prior to Nese's employment with Nordic and while he ran his own business, he was a member of the Downers Grove (Illinois) Chamber of Commerce and of a business networking group called the Lodge. Only one construction contractor was allowed to be a member of the Lodge. Nese held that membership. Also, though, Tom Julian, the owner of Nordic, was a member of the Lodge in his capacity not as a contractor, but as the owner of a cleaning service. The two men were acquainted and, in fact, it appears that Julian was instrumental in obtaining Nese's membership in the Lodge. The two men also assisted each other in generating business.

In August 2000, Julian hired Nese to work for Nordic on a 90-day trial basis. Nese informed Julian that he did not have a driver's license at that time because he had suffered a seizure. Nevertheless, Julian hired him and provided another employee to drive Nese to work until he was able to regain his driver's license. Nese's hourly rate of pay was $22.50 per hour.

However, in February 2001, Nese's hourly rate was reduced to $18.00 per hour. The controversy between the parties arises at this point. The wage rate was changed either because Nese's work pace was not up to the standard of the other carpenters or because other workers were making less and the disparity was causing a problem. There is a controversy also over whether any Nordic employee had talked to Nese about problems with his work. When Nese's hourly rate was decreased, Julian completed an employee status change form which, at that time, did not contain any comments regarding the pace of his work. At some time, however, the form was amended and a comment was added that Nese's "[w]ork pace is not to standards of peers."

As to the pace of his work, Nese contends that it "may not have been exactly" like that of the other workers, but it was comparable. His supervisor, Gary Boerma, asked Nese and other carpenters to pick up the pace. Then in September 2001, Boerma completed a performance evaluation of Nese. The evaluation, in its present form, has a section covered with "white-out." Nese says the white-out was not there when he first saw the evaluation. Boerma says it was and that it covered a comment that another Nordic employee found unprofessional. The original comment was, "Louis has worked for himself for a long time and has apparently never had to shift gears." After that comment was covered, Boerma wrote, "He needs to complete assigned task within acceptable time frame, also needs to learn new tasks and methods." A month later, Nese was given a raise to $18.50 per hour.

Then in November 2001, Nordic received a letter from a legal advocacy group acting on Nese's behalf. The letter accused

*Appendix A*

Nordic of possible discriminatory acts relating to the company's treatment of Nese. In January 2002, Nese was transferred to the side of Nordic's business which did insurance repair work. Julian completed an employee status change form that documented the transfer. On the form, Julian wrote, "Pace of work is still a problem— smaller jobs will be better suited to gauge pace." A few weeks later, Nese was placed on temporary layoff due to lack of work. By October, Nese apparently felt that he had been fired. Following the layoff, Nese worked fixing up a home and since May 2003 has worked for a company called One Stop Construction. He admits that he can perform carpentry work.

The basis of Nese's appeal is, of course, that in some manner Nordic lowered his wages and then terminated him because of his disability—epilepsy. He does not claim, however, that his epilepsy actually makes him disabled within the meaning of the ADA. His claim is that Nordic perceived him as disabled and then made adverse employment decisions because of that perception.

We review the grant of summary judgment *de novo*. *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir.1999). Summary judgment is appropriate if on the record as a whole "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

To establish disability discrimination, Nese must show that he is disabled within the meaning of the ADA, that he is qualified to perform the essential functions of the job, either with or without a reasonable accommodation, and that he suffered from an adverse employment action because of his disability. *Byrne v.*

*Appendix A*

*Board of Educ., School of West Allis-West Milwaukee*, 979 F.2d 560 (7th Cir.1992). In order to establish his prima facie case that he is disabled, Nese can show either (1) that he has a physical or mental impairment that substantially limits him in one or more major life activities; (2) that he has a record of such an impairment; or (3) that the employer regarded him as having such an impairment. 42 U.S.C. § 12102(2). If his condition does not meet one of these categories even if he was terminated because of some medical condition, he is not disabled within the meaning of the Act. The ADA is not a general protection for medically afflicted persons. *Christian v. St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051 (7th Cir.1997). As we said, Nese is contending not that he is actually disabled, but that Nordic regarded him as disabled. Under a "regarded as" claim, a plaintiff must prove that either: (1) the employer mistakenly believes the employee has a physical impairment that substantially limits a major life activity; or (2) the employer mistakenly believes that an actual, nonlimiting impairment substantially limits a major life activity. *Amadio v. Ford Motor Co.*, 238 F.3d 919, 925 (7th Cir.2001) (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)); *see also* 29 C.F.R. § 1630.2(1). In other words, the employer "must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999); *see also Peters v. City of Mauston*, 311 F.3d 835 (7th Cir.2002).

If an ADA plaintiff establishes a prima facie case, the burden shifts to the employer to offer a legitimate nondiscriminatory reason for the employment decision. If the employer succeeds, then the burden reverts to the plaintiff to show that there is a

genuine dispute of material fact that the proffered reason for the employment action is pretextual. *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir.1995) (applying the indirect method of proof to ADA cases).

Perhaps realizing that there is nothing in this record to show that epilepsy had anything to do with Nordic's actions, nor has it limited his ability to work, Nese contends that he should prevail at the summary judgment stage because evidence that Nordic was aware of his seizure disorder should be combined with the evidence that Nordic "concocted" a pretextual justification for the termination—that is, that his work pace was slow. He sees evidence of pretext in the fact that the evaluation form has a whited-out statement. Nese wants us to collapse the requirement for a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), with the requirement that a plaintiff show that the defendant's reason for the employment action was pretextual. Basically, the argument is that if the company's reason for the employment action was somehow less than straightforward, we can draw the conclusion that the company must necessarily have been acting out of its perception that Nese was disabled. Nese asks too much.

The source of the argument is a case from the Court of Appeals for the Sixth Circuit—*Ross v. Campbell Soup Co.*, 237 F.3d 701, 708 (2001). The court stated:

> Because, under the "regarded as" prong, Ross's prima facie showing that he is disabled turns upon the employer's state of mind and how it thought Ross's back condition affected his performance as an employee, evidence of the employer's state of mind

> that would ordinarily be used to prove motive or discriminatory intent may also be probative of Ross's status as a person with a disability as defined by the ADA. Thus, evidence that the company created a pretextual reason for Ross's firing may tend to prove that it regarded Ross as a disabled employee.

A later case from the same court may, however, reveal the limits of the *Ross* holding. In *Cotter v. Ajilon Services, Inc.*, 287 F.3d 593 (2002), the court agreed with the *Ross* panel's sympathy for plaintiffs because of the steep challenge they face in proving that an employer regarded them as substantially limited in their ability to work. However, in upholding judgment for the employer, the *Cotter* court distinguished *Ross:* "In *Ross,* there was substantial evidence that the plaintiff's medical status significantly influenced his employer's decision to terminate him; here, the evidence is insubstantial, and certainly far less compelling than in *Ross.*" The court concluded that Cotter did not offer sufficient evidence to support a conclusion by a rational trier of fact that he was disabled or regarded as disabled within the meaning of the ADA. In other words, the court required some basis to support the leap from evidence of pretext to a conclusion that disability discrimination must have been afoot.

The *Ross* approach was soundly rejected by the Court of Appeals for the Tenth Circuit in *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1165 (2002):

> Mr. Rakity interprets *Ross* to mean the issue of pretextually concealed discrimination and the issue of "regarded as" disabled should be treated as one and the same. This proposed modification of the

> *McDonnell Douglas* framework would open the protected class to individuals who neither have an actual disability nor can even present triable evidence their employer believed they have a disability. We do not think the Sixth Circuit intended such an interpretation, and if it did, we decline to follow it.

Like the Tenth Circuit, we also decline to follow *Ross*.

An employer is not guilty of discrimination every time it takes an employment action for one reason, but provides a different explanation to the employee. For example, perhaps the employer terminates an employee simply because her supervisor does not get along with her. That might not be a reason the employer wants to admit openly, so, instead, work deficiencies—real or imagined—are cited as the basis for the action. Even though we could wish such shenanigans never happened, we suspect they do, and they do not violate the employment laws unless, for instance, the real reason the supervisor dislikes the employee is based on some protected characteristic. That is why the employee must first establish that she falls into a protected group before we look at either real reasons or pretextual ones for the employment action. In other words, to say the employer was less than perfectly frank does not prove that the employer acted as it did for discriminatory reasons.

We will examine Nese's claim in the same manner that we have long examined all such claims. Nese is an epileptic. A medical condition, however, by itself does not constitute a disability under the statute. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir.2000); *Moore v. J.B. Hunt Transp., Inc.*,

221 F.3d 944 (7th Cir.2000). To show that he was disabled under the ADA, Nese must show that Nordic was aware of his impairment (which it was) and that Nordic believed that he was substantially limited in a major life activity (in this case, working) because of the impairment. *Skorup v. Modern Door Corp.*, 153 F.3d 512 (7th Cir.1998). Nordic must have believed Nese was unable to work in a particular class or broad range of jobs. With respect to the major life activity of work, as we noted in *Moore*, the standards applicable to an actual disability apply as well to a perceived disability. Section 12102(2) looks beyond the plaintiff's inability to satisfy one employer. To be a substantial limitation on his ability to work, the limitation "must be one that affects the plaintiff's ability to perform a class or range of jobs before it qualifies as a disabling limitation under the ADA." *Skorup*, 153 F.3d at 515. There simply is no evidence in this record that under this standard Nordic perceived Nese as disabled. In fact, Nese was hired even though he told Julian that he could not drive at that time because he had suffered a seizure. Also, as an aside, we will mention that the same person who hired Nese is the one who fired him. In that situation, we have said that it is unlikely that discrimination is involved. The conclusion is based on a common-sense psychological assumption, that "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." [Citations omitted.] *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 745 (7th Cir.1999).

Finally, the evidence of pretext is itself thin. The claim is, in part, that the statement "Louis has worked for himself for a long time and has apparently never had to shift gears" was covered up and the statement "He needs to complete assigned task within

acceptable time frame, also needs to learn new tasks and methods" was substituted. We are at a loss to understand how the former statement reveals discrimination or, in fact, how it is significantly different from the latter. The comment that Nese had no ability to shift gears can be interpreted as saying he needed to learn new tasks, etc. The fact that he worked for himself might also be seen as a reason that he did not complete tasks in a time frame acceptable to Nordic. Nothing indicates a belief that the reason Nese's work was not quite up to par was that he was disabled and unable to perform a broad range of jobs.

For these reasons, the judgment of the district court is AFFIRMED.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MAY 25, 2004

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

No. 02 C 5839

Judge John W. Darrah

LOUIS V. NESE,

Plaintiff,

v.

NORDIC CONSTRUCTION SERVICES, INC. and ADMINISTAFF, INC.,

Defendants.

**MEMORANDUM OPINION AND ORDER**

Plaintiff, Louis V. Nese, filed a suit against Defendants, Nordic Construction Services, Inc. and Administaff, Inc., alleging: (1) that Nordic violated the American with Disabilities Act ("ADA") by reducing Plaintiff's wages and terminating Plaintiff because he had epilepsy and that Administaff assisted, after the fact, in creating a non-discriminatory explanation for Nordic's actions (Count 1); (2) that those actions allegedly taken by the Defendants also

violated the Rehabilitation Act (Count II); and (3) that Nordic fraudulently induced Plaintiff into relinquishing his involvement with the Downers Grove Chamber of Commerce and the "Lodge" (Count III). Presently before the Court is Defendants' Motion for Summary Judgment.

## BACKGROUND

Defendant, Julian & Nordic Industries, Inc. ("Nordic"), incorrectly identified as Nordic Construction Services, Inc., is a general contractor in the business of providing commercial and residential general contractor services, as well as fire and water damage restoration services. (Def.'s 56.1(a)(3) Statement ¶ 1). Administaff Companies II, L.P. ("Administaff") is a professional personnel management services company. (Id., ¶ 2).

Nese is a forty-three-year-old male who began having seizures when he was fifteen years old.(Def.'s 56.1(a)(3) Statement ¶¶ 4, 7). Because of his seizures, Nese has taken prescription medication for approximately twenty-seven years. (Id., ¶ 8). Nese does not experience any side effects from his medications. (Id., ¶ 14). Prior to his work with Nordic, Nese worked as a carpenter for various employers, including Handy Andy and Builders Square. (Id., ¶ 10). Nese did not have any seizures during his employment with Nordic. (Id., ¶ 11).

From approximately 1991 to 1998, Nese was on disability and unable to work in any capacity due to constant seizures relating to his condition of epilepsy. (Plaint.'s 56.1(b)(3) Statement ¶ 2). In approximately 1997, Nese came

off of social security disability. Since that time, Nese's seizure disorder has not affected his ability to work or his quality of work. (Def.'s 56.1(a)(3) Statement ¶¶ 12-13).

After coming off of social security disability, Nese worked for his own construction company, L & N Builders ("L & N"). L & N became incorporated in approximately 1998. L & N did remodeling jobs. (Def.'s 56.1(a)(3) Statement ¶ 15). From 1997 until Nese began working for Nordic, Nese did not work for anyone except L & N. (Id., ¶ 16). At times, L & N lost money. (Id. ¶ 17). In the year prior to accepting employment with Nordic, Nese was the only employee of L & N. Nese could not find employees to stay and work for L & N even though he had advertised for employees in newspapers. (Id., ¶ 18). At one point, Nese had to turn away $40,000 in business because he did not have any employees. (Id., ¶ 19). In August 2000, when Nordic offered Nese a job, Nordic had given Nese a number of subcontracting jobs. (Id., ¶ 20). After Nese joined Nordic, he did not intend to keep L & N as a viable corporation. (Id., ¶ 21). Nordic never asked Nese to make certain that L & N was no longer viable. (Id., ¶ 22).

Prior to starting employment with Nordic, Nese was a member of the Downers Grove Chamber of Commerce and a member of a business-networking group called the Lodge. Only one construction contractor was allowed to be a member in the Lodge. (Def.'s 56.1(a)(3) Statement ¶ 24). Nese's membership in the Lodge was as the construction contractor. (Plaint.'s 56.1(b)(3) Statement ¶ 5). Prior to August 31, 2000, Tom Julian, Nordic's owner and president, was also a member of the Lodge. At that time, Julian did not participate in the

Lodge as a construction contractor. (Def.'s 56.1(a)(3) Statement ¶ 25). Julian was instrumental in Nese's joining the Chamber of Commerce and the Lodge. (Id., ¶ 30). Julian told Nese that he wanted Nese's seat on the Lodge as the construction contractor. Nese told Julian that everyone in the Lodge knew Nese and asked Julian if he could remain in the Lodge and attend the meetings on behalf of Nordic. (Plaint.'s 56.1(a)(3) Statement ¶ 6). Julian's membership in the Lodge was for a cleaning service that Julian owned. (Id., ¶ 7).

The Lodge is a group of 20 to 25 members from different businesses who get together to give each other leads for new business opportunities. The group meets once a week. (Def.'s 56.1(a)(3) Statement ¶ 27). To join the Lodge, the potential new member must get a current member to bring in the new member. It costs $75 per month to be in the Lodge. (Id., ¶ 28). The Lodge only allows one member per business category. Julian was the founder of the Lodge. (Plaint.'s 56.1(b)(3) Statement ¶ 9).

Between 1998 and 2000, Nese and Julian were friends and had a business relationship in which they assisted each other in generating business. (Def.'s 56.1(a)(3) Statement ¶ 29). From the time that Nese joined the Lodge until his termination from Nordic, Nese earned between $8,000 and $12,000 from business generated from activities with the Lodge. The business came from two sources — work completed in Nese's accountant's home and subcontracting work from Julian's fire damage restoration company. (Id., ¶ 31). Prior to Nese's accepting employment with Nordic, Julian told Nese that he would have to relinquish his seat in

the Lodge once he accepted employment with Nordic. (Plaint.'s 56.1(b)(3) Statement ¶ 11).

After obtaining employment with Nordic in August 2000, Nese decided not to renew his membership in the Chamber of Commerce. He made this decision because he was working for Nordic and did not want to spend $280 for the membership. (Def.'s 56.1(a)(3) Statement ¶ 33). Nese also decided that he did not need to generate business from the Lodge because he now worked for Nordic. Within a few weeks of starting his employment with Nordic, Nese gave up his membership in the Lodge. (Id., ¶ 34). With Nese's consent, Julian took Nese's place in the Lodge. (Id., ¶ 35).

In 1998 or 1999, Julian first offered Nese a job with Nordic. Nese did not accept the position. (Def.'s 56.1(a)(3) Statement ¶ 36). In August 2000, Julian again wanted to hire Nese for a job with Nordic. At that time, Nese informed Julian that he was unabe to drive to work becauuse he did not have a driver's license because he had epilepsy. Nese's inability to drive was a factor in his search for employees for L & N. When Nese told Julian that he had epilepsy, Julian's esponse indicated that he did not consider such to be a factor in Nese's employment. Subsequently, Julian hired Nese and provided another employee to drive Nese until Nese was able to obtain his driver's license. (Id., ¶ 38). At the time Julian offered Nese a job, Julian told Nese tha the offer would allow Nese to work with a team, take pressure off of Nese in terms of finding work, and provide Nese with benefits. (Id., ¶ 39). Because Nese was only doing subcontracting work for Nordic and Nese was having a difficult time finding employees, Nese accepted a position with Nordic. (Id., ¶ 41). Julian also told

Nese that Nese would no longer have to worry about having a job. (Plaint.'s 56.1(b)(3) Statement ¶ 17).

Nordic hired Nese as a carpenter on August 31, 200, at the rate of $22.50 per hour. (Def.'s 56.1(a)(3) Statement ¶ 43). When Nese joined Nordic, Julian informed him that he would have a 90-day trial period to see if Julian wanted to retain him at Nordic. (Id., ¶ 46).

As a carpenter for Nordic, Nese gutted out fire-damaged rooms in homes and remodeled such areas. He performed rough and finish carpentry work, including putting up drywall, replacing windows, putting in trim, and putting in cabinets. (Def.'s 56.1(a)(3) Statement ¶ 48). Nese also did roofing work. (Id., ¶ 49).

Effective February 28, 2001, Nese's hourly rate was reduced to $18.00 per hour. (Def.'s 56.1(a)(3) Statement ¶ 50). Nese's wage was changed because he work pace was not up to the standards of his peers. (Id., ¶ 51). Nese believes that Julian told him his wage was reduced because other workers were making less than Nese and tht it was causing a problem. (Id., ¶ 52). Prior to his reduction in pay, Nese's supervisor, Gary Boerma, never commented to or made complaints to Nese regarding deficiencies in Nese's productivity. (Plaint.'s 56.1(b)(3) Statement ¶ 18). Boerma testified that he did speak to Nese on multiple occasions concerning problems with Nese's work. (Boerma's Dep. pp. 45-46, 54-59). When Nese's hourly rate was decreased to $18.00 per hour, Julian completed an Employee Status Change form, which did not contain any comments relating to the pace of Nese's work. (Plaint.'s 56.1(b)(3) Statement

¶ 46). At some time, the form was amended; and the comment "Work pace is not to standards of peers" was added. Julian is unsure whether he altered the form the year following the March 12, 2001 date that he originally completed and signed the form. (Id., ¶ 48).

Nordic believed that Nese's pace was deficient, and Nordic personnel had numerous concerns and conversations regarding Nese's work pace. (Def.'s 56.1(a)(3) Statement ¶ 54). Nese believed that his work "may not have been exactly" like other workers, but it "was comparable." (Nese Dep. p. 145). During his employment, Nese's supervisor, Gary Boerma, asked Nese, as well as other workers, to pick up his pace. (Def.'s 56.1(a)(3) Statement ¶¶ 56-57). Of three instances in which Boerma asked Nese to pick up his pace, one was a general address to all employees; and two were to Nese personally. (Id., ¶ 59). Nese believed that he was made the scapegoat for cost overruns and the length of time it took to complete projects because everyone around Boerma was either family or had been around for years. (Id., ¶ 64). Nese also believes that Julian asked him twice, following his decrease in pay, whether the medications Nese took affected his ability to perform his job. (Plaint.'s 56.1(b)(3) Statement ¶ 24). Julian denies ever having asked Nese about his medications and his ability to perform his job. (Julian's Dep. pp. 80-81).

On September 27, 2001, a performance evaluation was completed by Boerma. Following the completion of the evaluation, a meeting was held. At the meeting, Nese was shown a copy of the evaluation; at which time, there was no whiteout on page four of the evaluation. (Plaint.'s 56.1(b)(3)

Statement ¶ 26. Boerma denies that the whiteout did not exist at the time of the evaluation, and the whiteout was used to change a comment that another Nordic employee did not feel was professional. (Def.'s Resp. to Plaint.'s 56.1(b)(3) Statement ¶ 26). Nese believes that he requested a copy of his performance evaluation and that the request was denied. Nordic denies that Nese requested a copy of the evaluation. (Id., ¶ 28). Nese's performance score for his evaluation was 32 points out of 60, 2 points greater than the minimum score of 30 for "satisfactory." (Plaint.'s 56.1(b)(3) Statement ¶ 36).

On October 10, 2001, shortly after Nese had completed his first year of employment with Nordic, Julian increased Nese's hourly rate of pay from $18.00 per hour to $18.50 per hour. (Plaint.'s 56.1(b)(3) Statement ¶ 40).

On November 5, 2001, Nordic received a letter from a legal advocacy group acting on Nese's behalf wherein the legal advocate accused Nordic of possible discriminatory acts relating to their treatment of Nese. Prior to this letter, Nese's personnel file contained only two references relating to the pace of his work: (1) the March 12, 2001 Employee Status Change form and (2) the September 27, 2001 performance evaluation. (Plaint.'s 56.1(b)(3) Statement ¶ 33).

On January 9, 2002, Nese was transferred to the insurance repair work side of Nordic's business. On that date, Julian signed an Employee Status Change form that documented Nese's transfer. In the remarks section, Julian wrote, "Pace of work is still a problem — smaller jobs will be better suited to gauge pace." At the time Julian completed the form, Julian claims he was unaware that Nese was

investigating the possibility of a discrimination suit. (Plaint.'s 56.1(b)(3) Statement ¶ 43). On January 18, 2002, Nese was placed on temporary lay-off due to lack of work. (Def.'s 56.1(a)(3) Statement ¶ 66). On or about October 17, 2002, Nese felt that Julian and Boerma fired him because they did not think that Nese knew what he was doing. (Id., ¶ 68).

Between October 2003 and April or May 2003, Nese worked fixing up a home. (Def.'s 56.1(a)(3) Statement ¶ 69). Since that time, Nese has worked with One Stop Construction. (Id., ¶ 70). Nese has been able to perform his construction job without asking for an accommodation. (Id., ¶ 71). Nese is not limited in his ability to work, and he admits that he can work. (Id., ¶ 74).

## ANALYSIS

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (*Celotex*). All the evidence and the reasonable inferences that may be drawn from the evidence are viewed in the light most favorable to the nonmovant. *Miller v. American Family Mutual Ins. Co.*, 203 F.3d 997, 1003 (7th Cir. 2000). Summary judgment may be granted when no "reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (*Anderson*). However, a party cannot defeat summary judgment by relying on unsubstantiated facts. *See Greer v. Board of Educ. of the City of Chicago*, 267 F.3d 723, 729 (7th Cir. 2001).

*Appendix B*

***Count 1***

Defendant argues that Nese's ADA claim fails because he is not "disabled" as defined by the ADA.

The ADA prohibits employment discrimination against disabled individuals. 42 U.S.C. § 12112(a); *Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1059 (7th Cir. 2000). Under the ADA, an individual is disabled if he (a) has "a physical or mental impairment that substantially limits one or more . . . major life activities"; (b) has "a record of such an impairment; or (c) is "regarded as having such an impairment." 42 U.S.C. § 12102(2). If an individual's condition does not rise to the level of a disability, the individual cannot recover under the ADA even if the employer terminated the individual on the account of the account. *See Skorup v. Modern Door Corp.*, 153 F.3d 512, 514 (7th Cir. 1998) (*Skorup*).

Nese contends that he is disabled under 42 U.S.C. § 12102(2)(C) because Nordic regarded him as having a disability that substantially limited the major life activity of working.

It is not enough for Nese to show that Nordic was aware of his impairment; instead, Nese must show that Nordic knew of the impairment and believed that he was substantially limited because of it. *See Skorup*, 153 F.3d at 515. Accordingly, Nese must show that Nordic believed he was unable to work a particular class or broad range of jobs. *See Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944, 955 n. 7 (7th Cir. 1000) (*Moore*); *Skorup*, 153 F.3d at 515.

*Appendix B*

Nese makes the conclusory statement that there is sufficient evidence from which a reasonable fact-finder could conclude that Nordic believed that Nese's condition would exclude him from a broad range of jobs. However, the only evidence that Nese provides to support his conclusion is that of pretext — the alleged alteration of two documents to indicate that Nese worked too slowly. However, evidence that Nordic may have been less than forthcoming in identifying the reason for his termination does not establish a disability; instead, it may provide proof of a discriminatory motive once Nese has established that he falls within the ADA's protection. *See Moore*, 221 F.3d at 955 n. 7; *Rakity v. Dillon Co.*, 302 F.3d 1152, 1165 (10th Cir. 2002) (rejecting argument that issue of pretext and the issue of "regarded as" should be treated as one and the same). Nese fails to point to any evidence that Nordic perceived him as impaired in performing a broad range of jobs in various classes. Instead, all of the evidence demonstrates that Nese worked in construction prior to his tenure with Nordic, while at Nordic, and following his termination at Nordic. Furthermore, the only issue Nordic had with Nese's job performance was the pace of his work. Nordic had the same issue with other employees and told other employees to pick up the pace of their work. *See Moore*, 221 F.3d at 949, 955 (affirming summary judgment after District Court found, in part, that plaintiff's ability to walk, sit and stand, but at a slower pace, did not render the plaintiff disabled). Therefore, Nese has failed to establish that he is disabled under the ADA; and his ADA claim fails.

## *Appendix B*

### *Count II*

Nese concedes that his Rehabilitation Act claim fails because he is not a federal employee alleging disability discrimination in federal government or in a program that receives federal financial assistance as required by the Act. *See* 29 U.S.C. §§ 791, 794; *Mays v. Principi*, 301 F.3d 866, 868 (7th Cir. 2002).

### *Count III*

Lastly, Nordic argues that Nese's fraud claim fails. Nese argues that genuine issues of fact exist as to whether Julian offered Nese a position of employment as part of a scheme to induce Nese to relinquish his seat in the Lodge.

In order to prove fraud under Illinois law, Nese must establish: that (1) the defendant made a false statement; (2) of material fact; (3) which defendant knew or believed to be false; (4) with the intent to induce Nese to act; (5) Nese justifiably relied on the statement; and (6) Nese suffered damages from such reliance. *See Houben v. Telular Corp.*, 231 F.3d 1066, 1074 (7th Cir. 2000) (*Houben*). "Promissory fraud" is a false representation of intent concerning future conduct, *i.e.*, a promise to perform a contract when there is no actual intent to do so. As a general rule, promissory fraud is not actionable unless the promise is part of a "scheme" to defraud. *See Houben*, 231 F.3d at 1074. Furthermore, "'[w]ithout specific, objective manifestations of fraudulent intent, there can be no promissory fraud." *Bower v. Jones*, 978 F.2d 1004, 1012 (7th Cir. 1992) (internal quotations omitted).

Here, Nese fails to identify any false statement or representation by Julian. Instead, Nese contends that genuine issues of material fact exist as to whether there was a scheme to have him relinquish his seat on the Lodge. However, Nese knew before accepting employment with Nordic that he would have to give up his seat in the Lodge; and Nese fails to identify any false statement or representation by anyone to induce him to accept employment with Nordic and relinquish his seat in the Lodge. Without any false statement or representation, there cannot be fraud. *See Houben*, 231 F.3d at 1074. Furthermore, Nese has failed to identify any evidence of any "specific, objective manifestations of fraudulent intent." *See Bower*, 978 F.2d at 1012 (plaintiff's fraud claim failed because plaintiff failed to prove that the defendants made a promise never intending to keep it). Accordingly, his fraud claim fails.

For the reasons stated above, Defendants' Motion for Summary Judgment is granted.

Dated: May 25, 2004

s/ John W. Darrah
JOHN W. DARRAH
United States District Judge

## APPENDIX C — FEBRUARY 6, 2002 FACSIMILE FROM JULIAN NORDIC TO ADMINISTAFF

2/6/02

# JULIAN-NORDIC

THE JULIAN COMPANIES

23

Gail

Here's info you requested. Please call if you want to discuss.

| Carpenters | Date of Hire | Work Days offs of 1/1/02 – 2/4/02 |
|---|---|---|
| Boerma, Gary | 12/29/99 (1) | 2 |
| Boerma, Fred | 3/15/00 (2) | 6 |
| Brudnicki, Jim | 5/29/01 (5) | 4 |
| Castillo, Luis | 12/29/99 (1) | 5 |
| Nese, Louis | 8/31/00 (4) | 16 |

11/2001 4/Roof

Quit off —

Ask stay Home —

– Phone # new Foreman —

– Ask for accomodations? – Requested for 2a

– Told has unpaid overtime on file/wrote demand & not additions/removed?

– Dep. dismissed & emailed?

(1/16a - Lawsuit filed 2/12 01 - pay withheld)

Fire/wrote dep. age can't support ~~[illegible]~~ seen Louis Castillo also wrote on fire/wrote damage.

# APPENDIX D — MARCH 12, 2001 ORIGINAL EMPLOYEE STATUS CHANGE REPORT

# Employee Status Change

Employee Name: Luis Nava

Employee SS#: 356-56-8318

Client Name: Nordic Construction Dept.: Carpenter

Effective Date of Change: 2/28/09

**COMPLETE ALL THAT APPLY**

Name Change To (attach supporting documents):

Address Change To:

Phone # Change To:

Job Title Change To:

Status of F/T or P/T To:

Department Change To:

Pay Rate Change To: 18.00 Per: Hour

Change in Work. Comp. Code To:

Other:

REMARKS:

AUTHORIZED SIGNATURE:

TITLE: President DATE: 3/12/11

A-30

# APPENDIX E — MARCH 12, 2001 ALTERED EMPLOYEE STATUS CHANGE REPORT

# Employee Status Change

Employee Name: Luis Noya

Employee SS#: 356-54-8318

Client Name: Nuchase Construction Dept.: Carpenter

Effective Date of Change: 2/28/01

COMPLETE ALL THAT APPLY

Name Change To (attach supporting documents):

Address Change To:

Phone # Change To:

Job Title Change To:

Status of F/T or P/T To:

Department Change To:

Pay Rate Change To: 18.00 Per: Hour

Change to Work. Comp. Code To:

Other:

REMARKS: Work Pace is not to standards of peers

AUTHORIZED SIGNATURE:

TITLE: President DATE: 2/28/01

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## APPENDIX F — PLAINTIFF'S AUGUST 30, 2001 EMPLOYEE PERFORMANCE EVALUATION

# EMPLOYEE PERFORMANCE EVALUATION

The JULIAN COMPANIES

DATE: 8/30/01

NAME: Louis, Nese JOB LOCATION: ___

Hire Date: 8/31/01 ← 8/31/00

JOB TITLE: ___ DATE OF LAST EVALUATION: ___

NUMBER OF DAYS ABSENT ___ NUMBER OF DAYS LATE ___

Date of Appraisal: 9/27/01 @3:30pm Appraiser: Gary Reviewer: Tom & Eve

Please complete this form carefully and thoroughly. Remember its purpose is to:

- Provide objective criteria for personnel performance evaluations on a standard basis within your organization.
- Compel you to examine *all* of the individual traits affecting employee performance.
- Help you to support your conclusion and recommendation for job classification and compensation improvements.
- Produce fairer evaluations of employees.

**PROCEDURE:**

Pages 2 and 3 describe Fifteen personal traits identified with job success or failure. Decide for each, the level at which the employee performed for this rating period. Write the corresponding value number in the rating column. Add the numbers to obtain a total score.

Transfer this total to the rating scale on page 4. This will indicate, and support, your overall opinion of the employee's performance.

Refer back to pages 2 and 3 to comment on the employee's principal strengths and weaknesses. Your comments should be consistent with your rating of individual traits.

Finally, you should describe the employee's reaction to this evaluation, if you discuss it, and make your recommendation for any changes in the employee's job classification or rate of pay.

AD124

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*Appendix F*

| PERSONAL TRAITS | | UNSATISFACTORY | SOME DEFICIENCIES EVIDENT | SATISFACTORY | EXCEPTIONAL | CLEARLY OUTSTANDING | INSERT NUMERICAL RATING (0 THROUGH 4) |
|---|---|---|---|---|---|---|---|
| | | 0 | 1 | 2 | 3 | 4 | |
| KNOWLEDGE | The blending of perceived objective, skills and experience. | Severely lacking in knowledge. | Noticeable deficiencies in job knowledge. | Understands job routine. Some knowledge still to be acquired. | Completely understands all aspects of the job. | Understands why all job functions are performed and inter-relationship with other jobs. An expert. | 2 |
| QUANTITY | Level of satisfactory output generated per unit of time. | Usually below acceptable standard. | Rarely acceptable level of output. A slow worker. | Satisfactory. Meets expectations of average output. | Usually exceeds the norm. A fast worker. | Exceptional producer. Generates maximal output. | 1 |
| ACCURACY | Absence of errors. | Consistently commits errors. | Error level too high. Needs improvement. | Makes average number of mistakes. | Very accurate. Commits few errors. | Extremely accurate. Rarely commits an error. | 2 |
| JUDGMENT | Capacity to make reasonable decisions. | Frequently makes irrational decisions. Poor judgment. | Too often selects wrong alternative. | Usually exercises sound judgment. | Above average reasoning ability. Makes wise judgments. | Possesses high level of sound judgment. Decisions usually best under circumstances. | 2 |
| INNOVATION | Imagination and creativity used to lower costs and improve profits. | Never offers a new procedure or new idea. | Rarely suggests new ideas. | Average number of suggestions for improving methods and procedures. | Often suggests beneficial changes and professional improvements. | Very innovative. Constantly offers imaginative suggestions for improving operations. | 2 |
| APPEARANCE & HABITS | Personal habits, clothing and grooming production should consider the nature of the job. | Frequently offensive. | Occasionally sloppy appearance or display of offensive habits. | Usual; properly dressed and groomed. Few poor personal habits. | Rarely exhibits poor appearance or offensive habits. | Always properly dressed for the job. Personal habits are never offensive or in poor taste. | 3 |
| ORDERLINESS | Organization of the individual's work and work area. | Usually disorderly and chaotic. | Frequently unprepared or work area in disarray. | Work sufficiently organized to efficiently perform the job. | Highly organized and efficient worker. Few instances of poor performance from lack of order. | Exceptionally prudent in organization work. Has immediate access to anything needed. Extremely efficient. | 2 |
| COURTESY | Respect for feelings of others. Politeness on the job. | Frequently rude. Causes noticeable discomfort to others. | Occasionally hostile to coworkers or others. | Observes common courtesies. Does not offend. | Very considerate of other's feelings and rights. Always polite. | Extremely courteous, well mannered and polite. Always considers the comfort and ease of others. | 3 |
| COOPERATION | Willingness to help others accomplish their objectives. | Usually uncooperative. A "troublemaker" to coworkers, customers or suppliers. | Too often uncooperative when faced with reasonable requests for assistance. | Generally a cooperative person on the job. | Very cooperative. Often offers assistance. Can usually be counted on to help. | Extremely cooperative. Constantly offers aid and always available to help others. | 2 |
| INITIATIVE | Voluntarily starting projects, encouraging new duties and tasks. | Shows little initiative. Never volunteers. Shirks chores in job duties. | Shows weak initiative. Should do more without having to be told. | Does not shirk. Voluntarily attempts to solve non-routine job problems as they occur. | Above average. A self starter. Will generally volunteer. | Forces highest priority on getting things done. Consistently accepts difficult or unpleasant jobs to achieve goals. | 2 |
| RELIABILITY | Dependability and trustworthiness. | Has reliability. Often fails to deliver a complete job. | Occasionally leaves routine tasks incomplete. | Can be relied on to complete all aspects of job. | Completes work with little supervision. Will undertake occasional special projects. | Extremely dependable and trustworthy. Accepts all assignments. Always performs as expected. | 2 |
| PERSEVERANCE | Steadfast pursuit of job objectives when faced with unexpected obstacles. | Frequently quits when faced with unexpected obstacles. | Is sometimes deterred by obstacles which should be overcome. | Is not stopped by most obstacles, works through them. | Displays sufficient drive to overcome reasonably difficult obstacles. | Always displays concrete determination. Will rarely quit until objective is reached. | 2. |
| STABILITY | Even temperament. Acceptance of constructive criticism and pressure. | Volatile, inconsistent personality. Disrupts work environment. | Occasional display of temper or emotion sufficient to disrupt others and hinder own performance. | Even tempered. Absorbs routine pressure on job. | Can tolerate small of pressure and tension without disrupting performance. | Performs consistently and effectively under extreme pressure. Never visibly flusters. | 2 |
| ATTENDANCE | | Frequent unexcused absences or absences from work. Very poor attendance record. | Absences or tardiness below standards. | Satisfactory attendance record. | Rarely late or absent. | Absent never less or rarely. Always accepts overtime work, if offered. | 3 |
| | ...YESS Ability to quickly understand new information and directions. | Very slow to grasp ideas and points. | Usually needs extra instruction. | Understands usual new ideas and re-assignments without excessive explanations. | Fast learner. Grasps new information quickly. | Extremely bright. Analyzes and understands new concepts at first exposure. | 2 |
| | | | | | | TOTAL (TO TOP OF PAGE) | 32 |

*Appendix F*

**Summary Score** TOTAL [MARK TOTAL NUMERICAL RATING ON SCALE BELOW]

0 UNSATISFACTORY — 15 SOME IMPROVEMENT NEEDED — 30 SATISFACTORY — 45 EXCEPTIONAL — 60 CLEARLY OUTSTANDING

**Comment on principal strengths:** Louis wants to learn. He is easy to get along with. Gets along with his co-workers. Dependable, always on time. very early

**Comment on principal weaknesses and suggestions for improvement:**

He needs to complete assigned task within acceptable time-frame, also needs to learn new tasks and methods. See Explain.

**Has this evaluation been discussed with the employee?** ☐ Yes ☒ No

**Comments:**

**Your recommendation for present and future job classification:**

RATED BY (Name and Title): Gary Sorrue
Supervisor

APPROVED BY:

Completion of this section by employee, is optional, and subject to the policy of your organization.

I have reviewed this evaluation and I completely understand its contents. A-34

Date 9/27/01 Employee's signature Louis T. Rose